

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 533-5800

DATE: August 18, 2014

TO: Bill Fulton, Director, Planning Department

FROM: City Attorney

SUBJECT: Ability to Approve Entitlements for Uses of Pueblo Lands Other Than Those Approved by the Electorate

INTRODUCTION

The sale or lease of City-owned Pueblo Lands is protected by San Diego Charter section 219. Charter section 219 requires that any lease of Pueblo Lands in excess of 15 years or sale of Pueblo Lands first be approved by an ordinance of the San Diego City Council and subsequently ratified by the electorate.¹ San Diego Charter § 219. In 1979, the City Council approved San Diego Ordinance O-12685 (Ordinance) allowing the lease or sale of various portions of Pueblo Lands, and the electorate ratified the Ordinance. Prop. B., Special Municipal Elec. (Sept. 18, 1979). The Ordinance approved by the electorate stated that the leases or sales would be for “the general purpose of accommodating scientific research activities, manufacturing research and development activities, corporate headquarters, high technological-like [sic] manufacturing activities and related or similar uses.”² *Id.* The Ordinance also stated that the proceeds from the lease or sale would be used to finance police facilities. *Id.* The Office of the City Attorney has been asked whether entitlements may be granted by the City for uses other than those specified in the Ordinance, such as professional offices or retail sales.

¹ For a summary of the history of Pueblo Lands and Charter section 219, see 1999 Op. City Att’y 40 (99-2; July 15, 1999).

² The argument in support reads “high technology light manufacturing.” Ballot Pamp., Special Municipal Elec., (Sept. 18, 1979), argument in favor of Prop. B at 6.

QUESTION PRESENTED

May the City grant entitlements for uses of Pueblo Lands that are not specified in the Ordinance authorizing the lease or sale of the Pueblo Lands, without a vote of the electorate?

SHORT ANSWER

Generally, no. Although Charter section 219 only requires that the electorate approve the lease or sale of the Pueblo Lands, this Ordinance sought the electorate's approval for the lease or sale on the basis of the specific use of the lands and proceeds. The Ordinance does allow some flexibility in the use of the Pueblo Lands, however, if the uses are for the "general purpose" of the listed uses, or are "related or similar uses."

ANALYSIS

Ballot measures are subject to the same rules of statutory interpretation as other statutes. *Robert L. v. Superior Court*, 30 Cal. 4th 894 (2003). The intent of the legislature, in this case, the electorate, is to be ascertained. *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537 (2000). If the intent cannot be ascertained by the plain meaning of the measure, for example, if the plain meaning is absurd or the language permits more than one reasonable interpretation, then extrinsic aids may be used to determine the intent. *Sanders v. Pacific Gas & Electric Co.*, 53 Cal. App. 3d 661 (1975); *Shaw v. People ex rel. Chiang*, 175 Cal. App. 4th 577 (2009). In the case of ballot measures, those extrinsic aids include the ballot arguments. *Robert L.*, 30 Cal. 4th 894; *Shaw*, 175 Cal. App. 4th 577.

The Ordinance states that the Pueblo Lands are to be used for "the general purpose of accommodating scientific research activities, manufacturing research and development activities, corporate headquarters, high technological-like [sic] manufacturing activities and related or similar uses." Ballot Pamp., Special Municipal Elec. at 5 (Sept. 18, 1979).³ Although the intent of the Ordinance to limit the uses of these Pueblo Lands seems clear, in the event that a court found the Ordinance to be ambiguous, such that resort to the extrinsic aids was necessary to determine the electorate's intent, this Memorandum also reviews the arguments in support and opposition.

The argument in support of the Ordinance presents the benefits of increased police services, job creation, and reduced tax burdens. Relevant to the issue of the use of the Pueblo Lands, the argument states that the proposed uses are "consistent with the adopted community plan and

³ Council Policy 900-03, Management and Marketing of City-Owned Industrial Property, adopted on October 2, 1989, requires purchasers of the City's industrial properties to agree to "appropriate reversionary rights or other penalties" if the disposition agreement is violated. Council Policy 900-03, Policy 2, Reversion. The Council Policy applies to Pueblo Lands referenced in the Ordinance. Council Policy 900-03, Policy 5.b, Disposition of Proceeds. It is not known whether any use restrictions were placed on any lease or sale of these Pueblo Lands; any such restrictions may also affect the ability of owners to use the Pueblo Lands for other purposes, but is not within the scope of this Memorandum.

include scientific research activity, manufacturing research and development, corporate headquarters and high technology light manufacturing.”⁴ Ballot Pamp., Special Municipal Elec., (Sept. 18, 1979), argument in favor of Prop. B at 6. This argument also states that the Ordinance will “permit the kind of clean industry that has proven to be advantageous to our environment and economy.” *Id.* The argument in opposition to the Ordinance only discusses the fiscal shortcomings of any potential sale of City-owned property, as opposed to the benefits of leasing the property, and therefore, does not provide any information relevant to this issue. *Id.*, argument against Prop. B at 6-7. Therefore, relevant to this discussion, the ballot argument simply echoes the uses set forth in the Ordinance, and then characterizes them as “clean industry” and “advantageous to our environment and economy.” *Id.*, argument in favor of Prop. B at 6.

As summarized herein, the acceptable use of these Pueblo Lands has been the subject of previous memorandums by this Office and actions by the City Council. Soon after the ratification of the Ordinance, this Office issued memorandums addressing the ability to use these Pueblo Lands for other uses.⁵ One memorandum analyzed the acceptability of a check printing operation and concluded that this use was not within those approved by the electorate. 1980 City Att’y Memorandum 391 (July 15, 1980). Another memorandum concluded that commercial uses such as barber shops, twenty-four hour automated banking tellers, restaurants, and small food markets could be allowed, if the uses were support services to those uses otherwise permitted. 1982 City Att’y MOL 48 (May 26, 1982). The limitation was that the proposed commercial use must be one needed to service the industrial and other authorized uses. *Id.* However, in 1990, the City Council authorized a Request for Proposals for a lease of a portion of these Pueblo Lands for uses permitted in the M1-A zone, which included retail commercial uses, and which the City Council determined to be “related or similar” to the uses in the Ordinance.⁶ San Diego Resolution R-275697 (May 14, 1990). The recitals stated that the parcel, because of its size and configuration, was not appropriate for the development and use specified in the Ordinance. *Id.* Lastly, this Office has opined that when the City uses these Pueblo Lands, the use is not restricted by the provisions of the Ordinance, because the Ordinance “authorizes, with restrictions, the alienation of these lands,” and so would not govern the use of the lands by the City. 1989 City Att’y MOL 201, 202 (89-50; May 23, 1989).

The electorate approved the lease or sale of these Pueblo Lands for the “general purpose” of allowing the listed uses, along with “related or similar uses.” The use of the qualifying language

⁴ Staff has indicated that these Pueblo Lands are within the University and Mira Mesa Community Plans. The University Community Plan in effect at the time stated that the City should “continue to reserve publicly owned land for the use of such life-science and other research facilities appropriate for the area.” University Community Plan, at 20 (1971). The Mira Mesa Community Plan in effect at the time stated that the M-1A zone or any zone which allowed commercial zoning should not be used in the Mira Mesa industrial area, with the exception of small parcels for which commercial uses could serve the surrounding industrial community. Mira Mesa Community Plan, at 62 (1977).

⁵ Although this Office prepared a memorandum and draft ordinance prior to the adoption of the Ordinance by the City Council, the memorandum discusses the ability to restrict the use of the proceeds, but does not discuss the ability to or purpose of restricting the use of the lands. 1979 City Att’y MOL 103 (May 18, 1979).

⁶ No M1-A zone was found in the San Diego Municipal Code History Table; however, there was an M-1A zone in use in 1990, when R-275697 was passed.

such as “general purpose” and “related or similar uses” allows some flexibility to allow other uses. As was discussed in one of this Office’s earlier memorandums, uses that support the listed uses are acceptable as falling within the “general purposes” as well as “related or similar uses” to the specific listed uses. For example, a small convenience store or restaurant close to a scientific research facility serving mostly those employees would be within the general purpose of the specific uses listed in the Ordinance.

However, in order to ensure that any entitlements for the limited uses that fall within the “general purpose” or are for “related or similar uses” to those listed in the Ordinance are actually limited to these uses, the City must have the ability to place greater restrictions on some of the uses than is currently provided for in the San Diego Municipal Code. For example, when property has been zoned for offices uses, such as the CR-2-1 and the CC zones, that office use is then permitted by right and the City does not have any opportunity or ability to place conditions on the future use or development such that any uses would be limited to offices related to “accommodating scientific research activities, manufacturing research and development activities, corporate headquarters, [and] high technological-like [sic] manufacturing activities.” San Diego Municipal Code § 131.0522, Table 131-05B; Ballot Pamp., Special Municipal Elec. at 5 (Sept. 18, 1979). The City could consider amendments to the San Diego Municipal Code that would create new office uses for those uses that fall within the “general purposes” of the ordinance or are “related or similar uses.”

If the City would like greater flexibility to lease or sell the Pueblo Lands than was allowed by the approval of the Ordinance, an amendment to the conditions in the Ordinance must be approved by the electorate. There is no authority in the Ordinance for the City to amend the Ordinance. An initiative may be amended only by the electorate, unless the initiative itself allows for amendment by the legislature. *Shaw*, 175 Cal. App. 4th at 596. The electorate has absolute power to decide whether the legislature may amend an initiative subject to conditions attached by the electorate.⁷ *Id.* As more than one court has said, “[w]e may not properly interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less.” *People v. Park*, 56 Cal. 4th 782, 798 (2013) (quoting *Hodges v. Superior Court*, 21 Cal. 4th 109 (1999)).

⁷ The courts may judicially reform legislation, including an initiative measure, to preserve its constitutionality if the reformation effectuates policy judgments articulated by the approving body and the approving body would have preferred the reformation to any invalidation. *Kopp v. Fair Political Practices Comm’n*, 11 Cal. 4th 607 (1995). However, application of the Ordinance consistent with the legislative intent as discussed in this Memorandum does not appear to present any issues of constitutionality, such that judicial reformation would be appropriate.

CONCLUSION

The City Council sought and obtained the electorate's approval of an Ordinance to sell or lease certain Pueblo Lands based on the use of those lands for limited purposes. The approved Ordinance allowed some flexibility in the use of the lands for these general purposes, and for related or similar uses. If the City would like greater flexibility in the use of the lands, an amendment to the Ordinance must be approved by the electorate.

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